Nos. 14-614 and 14-623

In The

Supreme Court of the United States

W. KEVIN HUGHES, ET AL.,

Petitioners,

v.

PPL ENERGYPLUS, LLC, ET AL.,

Respondents.

CPV MARYLAND, LLC, ET AL.,

Petitioners,

v.

PPL ENERGYPLUS, LLC, ET AL.,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN WIND ENERGY ASSOCIATION IN SUPPORT OF PETITIONERS

*GENE GRACE
Counsel of Record
AMERICAN WIND ENERGY ASSOCIATION
1501 M St., N.W.
Washington, DC 20005
(202)383.2500
GGrace@awea.org
Counsel for Amicus Curiae

QUESTION PRESENTED

1. Is a state's effort to facilitate the construction and operation of desired energy generation by directing its local utilities to enter into a long-term contract field or conflict preempted by the Federal Power Act as an attempt to set interstate wholesale rates?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the American Wind Energy Association ("AWEA") respectfully submits this brief amicus curiae in support of Petitioners W. Kevin Hughes, *et al.*[1]

AWEA is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. The interests of the Amicus Curiae are threatened by the Fourth Circuit decision, which impermissibly constrains crucial state functions that are necessary to ensure the long-term procurement of renewable energy production and carry out other aspects of electric resource planning.

The Amicus Curiae has an interest in this case because state-conducted resource procurement efforts could ultimately be preempted on the same basis, which occurred with respect to the Maryland directive at issue,[2] or by an extension of the Fourth

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[1] AWEA counsel authored this brief, no counsel for a party to the decision below, or other entity authored this brief in whole or in part, and no person or entity other than AWEA made a financial contribution to the preparation or submission of this brief. In accordance with U.S. Sup. Ct. Rule. 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief.

[2] Maryland sought to maintain electric reliability through the increase of generation in certain areas. Under a 2012 generation order ("Maryland Generation Order"), the Maryland Public Service Commission ("PSC") solicited proposals for the construction of a new power plant in an area with a heightened risk of reliability problems as compared to the entire service area of the utility. The PSC issued The Maryland Generation Order offering a fixed, 20-year revenue stream obtained

Circuit's rationale to other state procurement efforts. In holding that long-term contracts for new generation exceed state authority by "effectively" or "functionally" setting wholesale prices, the Fourth Circuit decision encourages challenges over similar state-directed mechanisms to assure adequate generation capacity.

The decision significantly undermines state authority to decide the resource type, quantity, and timing of new or existing generation facilities that will be constructed or maintained within the state. Thus, the state's ability to ensure its electricity supply portfolio could be severely diminished, which would significantly impact renewable energy programs and other state environmental programs.

States must maintain diverse generation resource options through, among other things, directing long-term resource planning. Pursuant to such planning, states commonly seek to meet policies that encourage the deployment of new technologies, which are able to deliver cleaner, more reliable electric supplies, including increased renewable energy deployment. Recent federal environmental regulations have only served to increase the need for states to retain the ability to adjust generation resources. The Fourth Circuit decision puts in jeopardy the states' ability to meet these legitimate policy goals and legal requirements.

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through a Contract for Differences into which a local electric distribution company could enter.

SUMMARY OF ARGUMENT

The Fourth Circuit decision threatens the state's well-established resource adequacy authority that is explicitly recognized as part of state jurisdiction under the Federal Power Act ("FPA"). 16 U.S.C. §791 *et seq.* The Fourth Circuit erred in finding that authority field preempted, effectively both calling into question the state's police powers to engage in the long-term planning required to ensure its desired electric resource portfolio and impeding legitimate state action dependent thereon. The judgment should be reversed because it cannot be squared with the FPA and the proper exercise of state power.

In the alternative, if this Court should affirm the decision below, AWEA urges the Court to narrowly tailor its decision to the specific facts present in the case. An overly broad decision could have negative consequences for the ability of states to set and maintain their own energy portfolios.

ARGUMENT

I. THE STATE ACTION AT ISSUE IS NEITHER FIELD PREEMPTED NOR CONFLICT PREEMPTED.

The Constitution mandates that federal law take primacy over state law.[3] Specifically, any state law that "interferes with or is contrary to Federal law . . . must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824)). The Court has divided the preemption doctrine into three areas: express preemption, field preemption, and conflict preemption. An action is field preempted if Congress evinced a clear intent to regulate a subject exclusively by federal law. Conflict preemption occurs when compliance with both federal and state regulations is not possible. Preemption analysis carries an "assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008).

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[3] The "Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Article 6, clause 2.

A. The State Action Is Not Field Preempted Because It Is a Valid Exercise of State Authority and It Is Within an Area of Traditional State Jurisdiction.

Although the Constitution mandates that federal law preempt state law, preemption is neither automatic nor absolute. The presumption against preemption is even greater "where Federal law is said to bar state action in fields of traditional state regulation[.]" *See e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[W]e have worked on the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

Both the FPA and Supreme Court precedent recognize state authority in resource adequacy and generation decisions. Maryland's directed procurement of a power plant falls within this area of state action.

Sates have long held exclusive regulatory responsibility for assuring generation resource adequacy. Before Congress created FERC, each state had the responsibility to ensure that adequate electric generation resources were constructed to meet demand. Local utilities built, owned, and operated power plants and distributed electricity to their customers. State commissions set rates sufficient to reimburse utilities for their prudently incurred expenses in order to recover on their investment and finance construction. Early in the twentieth century, electric utilities began to sell power or standby capacity to each other in interstate

wholesale transactions in order to ensure sufficient resources for peak demand.

Congress enacted the FPA in 1920 (and amended it in 1935). Enactment of the FPA created affirmative federal jurisdiction over the interstate aspects of electric energy. Under the statute, states retain exclusive jurisdiction over facilities used for the generation of electric energy. 16 U.S.C. § 824(b)(2). (FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy"). In effect, the FPA preserves the states well-established resource adequacy powers. States therefore have the discretion to employ these powers in a manner that they find to be most optimal; for example, states may determine how to meet state policy goals such as diversity of supply and grid stability.

Consistent with the terms of the FPA and the historical background of electricity regulation, FERC does not have the additional authority to plan for, authorize, or require the construction or retirement of power plants. Rather, FERC supervises and approves the prices established in markets administered by state commissions and regional transmission organizations.

Supreme Court precedent has also recognized the state authority over the reliability of local service and the administration of integrated resource planning and resource portfolios. *See e.g., New York v. FERC*, 535 U.S. 1, 24 (2002). The Maryland Generation Order, as an action to ensure adequate electric generating capacity to meet state needs, falls unmistakably under the categories of reliability, integrated resource planning, and the determination

of resource portfolios, all of which are designated within state jurisdiction under the FPA. When Congress preserved state authority over these types of actions in the FPA, it intended states to fulfill these roles. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("[w]here . . . the field in which Congress is said to have preempted has been traditionally occupied by the states . . . we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Maryland's action was not only a traditional state action, but Congress did not evince a "clear and manifest" purpose of preemption; in fact, Congress intended to reserve those areas to the states.

In short, Maryland exercised its deep-rooted resource adequacy powers granted to states under the FPA, and the Fourth Circuit erroneously concluded its actions to be preempted, depriving the state of its authority to determine its electric resource portfolio. Accordingly, field preemption is inapplicable in this case.

B. The State Action Is Not Conflict Preempted Because It Is Not in Direct Conflict with Federal Law and Does Not Invade FERC's Jurisdiction over Wholesale Sales of Electricity in Interstate Commerce.

This Court has indicated that the argument for conflict preemption is particularly weak where Congress is aware of the operation of both state and federal law in a particular area and "has nonetheless

decided to stand by both concepts and to tolerate whatever tension there [is] between them." *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014).

Neither the FPA nor any other federal statute mentioned in the Fourth Circuit decision appears to rise to the level of conflict preemption with respect to Maryland's procurement. We are not aware of any provision in direct conflict with Maryland's action such that compliance with both the FPA and state law is not possible. Moreover, Maryland's energy procurement policy choice is not an obstacle to the accomplishment of a Congressional objective in the FPA.

Maryland's decision to require its local utilities to award contracts with stable, long-term pricing as an incentive to construct new power plants does not encumber price signals generated by PJM Interconnection LLC's yearly auction because that auction was not intended to be the exclusive impetus to build new power plants. Further, Maryland's procurement does not infringe upon or conflict with FERC's jurisdiction over wholesale sales of electricity in interstate commerce because it does not in fact set a wholesale price for capacity. Finally, Maryland's direction of procurement is not conflict preempted because Congress expressly recognized the division between state and federal authority with respect to energy regulation in the FPA, as discussed further above. 16 U.S.C. § 824(a).

Because there is nothing to suggest it is impossible to comply with both the FPA and the state action at issue and the state action is not an obstacle to the purpose of the FPA, the Fourth

Circuit erred when it found Maryland's action conflict preempted.

II. IF THE COURT UPHOLDS THE FOURTH CIRCUIT'S DECISION, IT SHOULD NARROWLY CONSTRUE IT TO ALLOW STATES TO INCENTIVIZE NEW GENERATION IN A VARIETY OF WAYS.

This Court has expressly recognized that states retain "authority in such traditional areas as . . . reliability of local service; . . . resource planning and utility buy-side . . . decisions[; and] . . . generation and resource portfolios." *New York v. FERC*, 535 U.S. at 24. The Fourth Circuit decision threatens the ability of states to innovate within these well-established powers and, in doing so, the decision threatens the public policy objectives that are dependent on such development. In particular, the decision calls into question the states' police powers to determine the diversity of their electric resource portfolios.

If this Court affirms the Fourth Circuit decision and does not emphasize that the preemption decision is limited to the specific circumstances of the Maryland program, it could stifle the states' ability to encourage new generation of clean energy. The Fourth Circuit made clear that "not every state statute that has some indirect effect on wholesale rates is preempted." Pet. App. 23a (internal quotation marks omitted). It further concluded that "the effect of the Generation Order on matters within FERC's exclusive jurisdiction is neither indirect nor incidental." Pet. App. 23a-24a. The court also declined to express an opinion on "other state efforts

to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative," leaving that question open. *Id.*

The Fourth Circuit decision inevitably sweeps broadly. Its fundamental premise—that a state effectively "sets" a wholesale rate by requiring retail utilities to contract with a willing seller—arguably reduces the states' Congressionally-sanctioned ability to determine their energy resource portfolios. If the simple bringing together of buyers and sellers for the purpose of ensuring reliability or furthering clean energy goals is preempted, all states face an increased risk of preemption as a result of the Fourth Circuit's holding.

If the decision below stands, without being limited, it can only serve to invite countless wasteful lawsuits over related state programs. This litigation risk for these programs exposes states and generation developers to substantial costs and uncertainty, chilling the enactment of new clean energy programs and investments. Specifically, the decision could be used in attempts to erode the states' authority to decide what new or existing generation facilities will be constructed or maintained within the state to achieve legitimate state policy objectives. This could inhibit development of new renewable generation. A broad decision upholding this opinion could also invite other courts to substitute their decision-making on public policy objectives reserved for states, and in turn, litigants to raise further challenges based on such decisions.

For these reasons, if this decision is upheld and not narrowly construed, it could place barriers to crucial state actions. Indeed, the scope of FERC's wholesale rate authority under the FPA could be erroneously expanded to preempt any wholesale procurement requirement contracts investor owned utilities enter into by order of a state mandate, regardless of whether the state action sets a wholesale rate. Such a ruling would, in turn, have the unintended effect of limiting the scope of state authority to lawfully develop its electric generation portfolio to achieve policy objectives.

This is not based on speculation but is already happening. The Fourth Circuit decision's sweeping reasoning has, in fact, already threatened state usage of essential tools to shape generation portfolios. Several important state initiatives already have been struck down or challenged based on the decision below.[4]

New renewable energy facilities, like other sources of generation, cost in the millions of dollars, and any practical investor requires a dedicated income stream prior to breaking ground. Long-term contracts and other state-mandate programs are often essential to the financing and construction of new renewable energy facilities.

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[4] For example, in Massachusetts, retail utilities terminated contracts with the developer of a planned 130-turbine wind project just before the First Circuit heard argument, citing financing delays that the developer traced to this litigation. *Barnstable v. O'Connor*, 786 F.3d 130, 141-42 (1st Cir. 2015). Other plaintiffs filed a preemption suit against contracts supporting a Rhode Island offshore wind project. *Riggs v. Curran*, No. 15-cv-343 (D.R.I. filed Aug. 14, 2015).

States have met public policy goals, such as developing cleaner generation resources, through a variety of tools. To date, states have been successful in utilizing a wide range of policies to encourage deployment of new technologies able to deliver cleaner electric supplies demanded by today's consumers, such as renewable generation. Beyond the states' role in establishing renewable energy policy, many, if not all states, conduct some form of either integrated resource planning or long term procurement planning to meet energy needs, regardless of whether they have restructured their electric industry. FERC has neither the jurisdiction nor the resources to handle that task. Recent and pending federal environmental regulations have placed even more pressure on the states' ongoing plans to adjust generation sources to meet policy goals.

The Court should be careful, if it upholds the Fourth Circuit decision, to safeguard and guarantee the states' continued right to operate these programs to procure new generation or maintain existing generation for reliability, affordability and environmental purposes through the use of long-term contracts or any state statutory or regulatory actions. In particular, if this Court affirms the Fourth Circuit's decision, we encourage the Court to be explicit that the Fourth Circuit's ruling construing the scope of FERC's jurisdiction is limited to its actual finding: FERC's jurisdiction preempts the states' actions to the extent they establish a set *price* for capacity from new generation units.

The Fourth Circuit never considered, nor was it asked to by the parties, whether securing of the

facility itself or the purpose for taking action to do so was preempted. In other words, the court below did not address whether a state action that promotes the development of certain power plants contemplated to participate in the wholesale energy market would be preempted merely because the action—increasing the supply of energy resources—affects wholesale energy prices. As such, the Fourth Circuit decision should not be interpreted to raise doubt as to whether the FPA preserves the states' jurisdiction to promote certain environmentally desired types of generation facilities when the state action does not set a wholesale electricity price.

To assure that distinction is clear, if the Court affirms the decision below, we urge the Court to clarify in its decision that state mandates that ensure long-term electricity supply is available to state customers by means of the construction and operation of certain generation facilities, and this does not, by itself, invade a federally occupied field and falls within the permissible realm of regulation reserved to states under the FPA. This is important to ensure that the decision below cannot fairly be read to broadly foreclose such state programs that incentivize new generation through economic or non-economic subsidies, provided those incentives do not directly interfere with the FERC-approved market mechanism for determining wholesale capacity rates.

In short, if the Court affirms the Fourth Circuit decision, it is critical that the Court clearly draw the distinction between a state directing the establishment of wholesale rates and a state ordering the utilities to purchase energy from certain resources to prevent unintended consequences for

lawful state-mandated solicitations and long-term power contracts, including state efforts to promote renewable energy to achieve environmental objectives; none of which disturb FERC's exclusive federal jurisdiction over wholesale rates.

III. CONCLUSION

This Court should reverse or, at a minimum, limit the Fourth Circuit's decision because it threatens the states' ability to ensure an adequate supply of electricity and to achieve state renewable energy goals.

Respectfully submitted,

GENE GRACE
Counsel of Record
AMERICAN WIND ENERGY ASSOCIATION
1501 M St., N.W.
Washington, DC 20005
(202) 383.2500
ggrace@awea.org